IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1513

UNITED STATES OF AMERICA,
Petitioner,

v.

RONALD S. JENKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF FACTS

1. This case was commenced with the return of an indictment on December 21, 1971 charging Ronald Stephen Jenkins with knowingly failing and neglecting to perform a duty required of him under the Selective Service Act and Regulations (Title 50 U.S.C., App. § 462(a)) by knowingly and failing to submit to inducting into the armed forces of the United States,

after notice had been given to the defendant by Local Board No. 50 exercising jurisdiction in that behalf requiring the defendant to report for induction on the 24th day of February, 1971. (Indictment No. 71 CR 1315 of the Eastern District of New York).

On January 13, 1972, Mr. Jenkins was arraigned before Honorable Edward Neaher. 45 days were requested for all pre-trial motions after Mr. Jenkins pleaded not guilty. No pre-trial motions were ever filed in this case and on May 23, 1972, the Government filed its Notice of Readiness for Trial. (App. p. 1)

The trial date was adjourned several times and on July 8, 1972, several papers concerning the upcoming trial were filed. In addition to the motion for judgment of acquittal, a motion concerning the voir dire of the prospective jurors, requests to charge the jury and a trial memorandum of law were filed. (App. 1 and 4). On July 14, 1972, the Government filed opposition papers to the defendant's voir dire and a trial memorandum of law. (App. 2)

On September 22, 1972, a motion for an order to substitute the prosecutor was filed returnable for September 25, 1972 (App. p. 1). On September 25, 1972, the U.S. Attorney was substituted on the grounds that the former U.S. Attorney Thomas Maher would be a witness for the Government (App. p. 1.) On October 3, 1972, the case proceeded to trial with Paul Warburgh representing the Government. In open Court, Mr. Jenkins and his attorney stipulated to the waiving of a jury trial and after a detailed catechism Honorable Anthony Travia permitted Mr. Jenkins to waive jury trial and proceed to trial before the Court without a jury. (App. p. 1 and pp. 5-9).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

The Government called two witnesses Elaine Morris, the executive secretary of Selective Service Local Board 50 and Thomas Maher, Assistant U.S. Attorney in the Eastern District of New York, who was formerly Chief of the Legal Division of the New York City Headquarters of the Selective Service System (App. p. 80; pp. 10-45). Mrs. Morris' testimony formed the basis of the Findings of Fact of Judge Travia (App. B42a).[1]

However, it is clear that Mrs. Morris testified on certain points from her personal knowledge of the facts of the case as well as reciting facts outlined in the file. (App. p. 228).

Thomas Maher testified that at the time immediately prior and directly after Mr. Jenkins' induction date he

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[1] The "Findings of Fact" were as follows:

1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

2. Defendant registered with Local Board no. 50, Brooklyn, New York on September 23, 1966.

3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

4. On January 20, 1971, the defendant was given a preinduction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

(footnote continued)

was the Chief of the Legal Division of Selective Service Headquarters in New York City and that as part of his official duties he had the occasion to become involved in the case concerning Ronald Jenkins (App. p. 38). The Local Board contacted his office in connection with the Jenkins case on February 23, 1971, the day before Mr. Jenkins' induction date, and Mr. Maher gave instructions to the Local Board not to postpone Mr. Jenkins induction date because it appeared on its face that Mr. Jenkins was opposed to a particular war. (App. pp. 40-43 especially). Thereafter, after Mr. Jenkins had not reported for induction on February 24, 1971 and after Mr. Maher had discussed Mr. Jenkins' case with Mr. Jenkins' attorney, the Selective Service file was called into Selective Service Headquarters and the decision was made to return the file to the local board with instructions to refer the case to the U.S. Attorney for prosecution. (App. p. 44). Mr. Maher testified from his personal recollection of the facts with occasional reference to the Selective Service file (App. p. 40, testimony of Thomas Maher).

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6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board and requested SSS Form 150 for a conscientious objector classification.

7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

8. The defendant did not report for induction on February 24, 1971.

9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971.

At the close of Mr. Maher's testimony, the Government rested and the case was recessed for lunch. Directly prior to lunch, the following colloquy took place:

> THE COURT: We will go out to lunch and come back.
>
> MR. CARROLL: Fine. I just want to state at this time I made a motion for judgement of acquittal, but I would like to reserve that until the close of my case.
>
> THE COURT: First thing after lunch I was going to ask you if you had any motions. So you can repeat that then. (App. p. 46).

After the lunch break, after the Government was granted leave to reopen its case briefly, for the purpose of introducing an exhibit into evidence, the following colloquy took place:

> THE COURT: Your turn, Mr. Carroll. Do you want to make any motions now at the close of the prosecution?
>
> MR. CARROLL: No, I would like to reserve my right to make motions.
>
> THE COURT: Defendant reserves all rights for all motions ordinarly [sic] made at the close of the prosecutions's [sic] case and you may proceed with your defense.

The defense put on three witnesses—Ronald Jenkins, the defendant; Jerome Bibuld, Mr. Jenkins' draft counselor; and Mrs. Phyllis Bates, Mr. Jenkins' mother. Prior to Mr. Jenkins' testimony there was discussion off the record as to the possibility of a disposition before the defense put on its case (App. p. 48). However, Mr. Jenkins insisted on going forward and trying the case (App. pp. 48-49).

Mr. Jenkins' testified that after he received the induction order in February 1971, he spoke to a draft counselor, Mr. Jerome Bibuld, and after speaking to him about conscientious objection for some time, he realized that he could not submit to induction, into the armed forces, because he was opposed to war (App. pp. 51-52). Thereafter, Mr. Jenkins requested a postponement of his induction. Although the postponement of induction was denied on February 23, 1971, Mr. Jenkins was given a C.O. Form 150 which he completed and returned. (App. p. 50). During the direct examination of Mr. Jenkins the Court intervened frequently to determine whether Mr. Jenkins' testimony was credible or not (App. pp. 49-62).

The next prospective witness was Jerome Bibuld, Mr. Jenkins' draft counselor. Mr. Bibuld's testimony, however, was never elicited, since the Government requested an offer of proof which was proffered by defense counsel and the offer of proof was denied by the Court.[2] (App. pp. 70-75).

Mrs. Bates the registrant's mother testified to facts relating to Mr. Jenkins' claim that his medical exemption was improperly denied and the defense rested directly thereafter. After the close of the defendant's case both sides rested and the court

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[2] The Government suggests in its brief at page 15 that "there has been no showing that he in fact was aware of or relied upon the case law . . .' Respondent never suggested such an excuse, although both he and his 'counselor testified at the trial." This is belied, however, by the fact that Mr. Jenkins' counselor did not testify at the trial although he was called as a witness and that the court precluded the line of questioning which would have shown that Mr. Jenkins was aware of the case law in the Second Circuit at the time and that he was relying upon this law).

reserved decision and gave both sides the opportunity to submit Findings of Fact and Conclusions of Law.

On October 24, 1972, the Court filed its Findings of Fact and Conclusions of Law (See App. 2; App. B, pp. 42a-52a; and *supra*). At the conclusion of the discussion, the Court stated that: "The indictment in this case is dismissed and the defendant is discharged."

The lower court warned, however, that:

> "in closing this court must emphasize that its decision with respect to the defendant must not be overread. In this case, Jenkins would be clearly prejudiced by any attempt to apply, retroactively, the Supreme Court's decision in Ehlert. This Court cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law. This is not to say, however, that under other circumstances a retroactive reading of *Ehlert* would not be warranted. (App. B. p. 52).

After exploring other cases from other circuits dealing with the applicability of *Ehlert*, the court had previously stated in its discussion, in finding that they were not controlling that:

> "Accordingly, those defendants would not be prejudiced, as the defendant Jenkins would be by a retroactive application of *Ehlert*; when they refused induction, they had not been apprised of the fact, through the interpretation of § 1625.2 in that circuit, that they would have to be heard by the Board on their claims.

The appeal to the Court of Appeals was commenced on November 21, 1972 with the filing of a Notice of Appeal by the Government. After argument by counsel, the Court of Appeals dismissed the appeal stating that:

"Although the district judge here characterized his action as a dismissal, it is clear from the analysis in *Sisson* that for double jeopardy purposes he acquitted the defendant. His ruling was based on facts developed at trial, which were not apparent on the face of the indictment and which went to the general issue of the case.

The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district's court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in Ehlert should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in Ehlert and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact."

2. This petition was filed by the Government on April 8, 1974, and was granted on May 28, 1974 along with the petition in *United States v. Wilson*, No. 73-1393 and the two cases were set down for argument in tandem. Respondent contends that under Title 18, U.S.C., § 3731 the lower court did not have jurisdiction to hear and determine the appeal from the district court's judgment.

ARGUMENT

THE COURT BELOW WAS CORRECT IN ITS DETERMINATION THAT IT DID NOT HAVE JURISDICTION TO HEAR AND DETERMINE THE APPEAL FROM THE LOWER COURT'S JUDGMENT UNDER TITLE 18 U.S.C., SECTION 3731 AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

This case presents no novel thesis to be determined by the court. In fact, except for the torture of the facts to which the Government has subjected this case, the essential legal issues have been determined time and time again by this court and by lower courts. *United States v. Ball*, 163 U.S. 662 (1896); *Kepner v. United States*, 195 U.S. 100 (1904); *Fong Foo v. United States* 369 U.S. 141 (1962); *United States v. Sisson*, 399 U.S. 267 (1970); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Hill*, 473 F.2d 759 (Ninth Circ. 1972). The Criminal Appeals Act, Title 18 U.S.C. section 3731 and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution forbid the Government from appealing from the district court judgment in the instant case.

Title 18 U.S.C., section 3731 reads that:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. . .The provisions of this section shall be liberally construed to effectuate its purposes."

In Title 18, USC, section 3731, it appears that Congress intended to extend the Government's right to appeal in criminal cases as far as it constitutionally could. *United States v. Jenkins*, 490 F.2d 868 (1973) (See Government's Appendix A-5a); Report of the Senate Committee on the Judiciary, 91st Congress, 2nd Session, No. 91-1296 at 9-13; Whether or not the Double Jeopardy Clause is coterminous with section 3731, the appeal in this case is barred by the Double Jeopardy clause and derivatively by Section 3731.

The general rule as to when a defendant has been put in jeopardy is technical but settled. In *United States v. Hill*, 473 F.2d 759 (Ninth Circ. 1972) quoting from *McCarthy v. Zerbst*, 85 F.2d 640 (10th Cir. 1936), the court states at page 761:

> "The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information has pleaded and a jury has been impaneled and sworn; and where a case is triedl [sic] to a court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the court has begun to hear evidence"

There is no doubt that jeopardy attached in Jenkins' case. He was indicted by a validly constituted Grand Jury and the indictment was valid on its face; he knowingly waived his right to trial by jury and proceeded to trial before the court (See Appendix 5-9 and Statement of Facts, *supra*); witnesses were sworn and testified and the trial proceeded to final judgment without interruption.

It is well settled also that a verdict of acquittal cannot be reviewed by an appellate federal court without violating the Fifth Amendment. *United States*

v. Sisson, supra; United States v. Ball, supra. This is true whether the case is tried before the court and a jury or the court acting as a fact finder. *Kepner v. United States, supra.* Those cases dispose of the issue at bar and your respondent would feel content to rest after having cited them except that the Government has called the continuing validity of these cases into issue and their applicability to the instant case. Before discussing the cases, however, the Government establishes its thesis.

The Government does not call into questions the principle that a factual determination on the merits which acquits the defendant, whether made by judge or jury, insulates the defendant from further proceedings. The Government, however, questions whether, if a judge acquits a defendant on purely legal grounds whether such an acquittal bars further review when a retrial is not required (Petitioner's Brief, p. 10). The Government contends that its thesis invokes no novel doctrine. (Petitioner's Brief, p. 10). However, it should not go without notice that the petitioner does not cite a single case to support its proposition.

THE TRUE DISTINCTION BETWEEN FINDINGS OF FACT AND RULING ON THE LAW.

The petitioner points out first in support of its thesis that the district judge made a purely legal ruling and that the facts were not in dispute. Therefore, all that is necessary is for this Court to correct the district court's "erroneous" application of the law to the facts. There

are several problems with this position not the least of which is whether a truly workable distinction can be made between a decision on the facts and one on the law.

There is no doubt, for example, that the district court considered the individual facts and circumstances of Jenkins' case and was not making a ruling that the indictment was insufficient on its face as a matter of law. Thus, as stated by the court of appeals the district judge's

> "ruling was based on facts developed at trial which were not apparent on the face of the indictment, and which went to the general issue of the case".

A fact finder frequently makes rulings on the applicability of facts to law. A jury being charged by the court on the law with regards to the self defense will make a determination as to whether the facts support such a defense. Such a determination by a jury would be reflected in a general verdict of guilty or not guilty. This verdict, however, would not be articulated in open court regardless of whether it was based upon an erroneous interpretation of the law or not. As such, it would be unassailable and could not be reviewed in any subsequent proceeding. *United States v. Ball, supra.*

It is not illogical for it to be any different when the fact finder is the court and not a jury. The court acting as fact finder does not have the luxury of being mute as to the rationale of how the law fits the facts found. The court must submit findings of fact and conclusions of law. However, the ultimate determination made after discussion as in this case, is whether the particular defendant is guilty or not guilty of the offense charged.

stated, when they refused induction they had not been apprised of the fact, through the interpretation of §1625.2 in that circuit, that they would have to be heard by the Board on their claims. App. B. p. 50A. One must remember that Jenkins at the time of his failure to submit to induction was represented by an attorney and had previously consulted with a draft counselor. It would not be outside of the facts for the district judge to consider this in determining whether Jenkins had knowledge of the law of the Second Circuit on February 24, 1971. This is in fact exactly what the district court did. (App. B. p. 50a). This assessment of Jenkins' knowledge or intent in not taking the symbolic one step forward is completely contrary to the petitioner's assertion that the result did not turn on credibility or demeanor. (Petitioner's Brief, P. 12).

Another problem with Petitioner's position, though, is that the distinction between an acquittal on the facts and a pure ruling on the law has not been previously articulated by the Court. *United States v. Sisson, supra; United States v. Weller*, 401 U.S. 254 (1971) on remand 466 F.2d 1279 (9th Cir. 1972); *U.S. v. Brewster, supra.* The foregoing cases stand for the proposition that a reviewing court does not have jurisdiction under 18 U.S.C. section 3731 when a dismissal is based on evidence adduced at trial and not on factual conclusions found in the face of the indictment. When the general questions of guilt or innocence to the charge are put in issue and the trial judge dismisses the indictment, a subsequent appeal by the Government violates the double jeopardy clause. *U.S. v. Hill*, 473 F.2d 759 (9th Cir. 1972).

In *United States v. Brewster, supra,* the interpretation of former section 3731 was in issue.[3] The district court on a pre-trial motion had dismissed the indictment against the former United States Senator defendant on the ground that the Speech or Debate Clause of the Constitution shielded him from prosecution for alleged bribery to perform a legislative act. The Government took a direct appeal to this court under former section 3731. Although the Court allowed the appeal, it stated the rule under *United States v. Sisson, supra* (See discusison infra) to be that:

> "an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment which facts would constitute a defense on the merits at trial, no appeal is available"
> 408 U.S. at p. 506.

It is unclear whether the decision in *Brewster* was based upon §3731 as it then read or on the double jeopardy clause itself. Its reliance upon Sisson and

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[3]Title 18 U.S.C. §3731 (1964 ed. Supp. U) provided in pertinent part: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

> "From a decision or judgment setting aside, or dismissing any indictment or information or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is formed.
>
> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy").

particularly the quoted phrase in Sisson seems to suggest otherwise. (See discussion of *Sisson infra*). Other cases from the various circuits make it clear that the distinction between an acquittal on the facts and a pure ruling on the law has not been treated as significant.

In *United States v. Hill, supra*, for example, the Ninth Circuit Court of Appeals held that the double jeopardy clause foreclosed review of the trial court's dismissal of an indictment prior to trial. After a pretrial hearing, the trial court dismissed the indictment which had charged the defendants with knowingly depositing obscene advertisement in the mail. The dismissal was based on the court's determination that *as a matter of law* the material was not obscene. The court of appeals, after reviewing the general rule as to when jeopardy attached, stated:

> "Having considered the evidence, the court rules, as a matter of law that the matter was not obscene, The Court did not hold that the indictments were defective. On their faces, they were valid. What the Court held in substance, was that the defendants before it were not guilty. 473 F.2d at p. 761.

In Hill, the court did not base its decision on an artificial distinction between a decision on the facts and a decision on the law. What was important to the court and for double jeopardy purposes was that facts outside of the indictment going to the general questions of guilt or innocence of the charge were elicited at the hearing.

Also of importance are several cases from the various circuits which deal with the appealability of district court orders dismissing indictments in selective service

cases after consideration of facts contained in the registrant's file. The following decisions have held that such a pretrial dismissal of an indictment is not appealable. *United States v. Ponto*, 454 F.2d 657 (Seventh Circuit, 1971); *United States v. Findley*, 439 F.2d 970 (First Circ. 1971); *U.S. v. McFadden*, 462 F.2d 484 (Ninth Cir. 1972); *U.S. v. Weller*, 466 F.2d 1279 (Ninth Circ. 1972); *U.S. v. Rothfelder*, 474 F.2d 606 (Sixth Cir. 1973).

In *U.S. v. Ponto, supra*, the Seventh Circuit Court of Appeals convened *in banc* concluded that the Government had no right to appeal from the pre-trial dismissal of the indictment in two separate selective service cases. The ruling was based both on §3731 and on the double jeopardy clause.

After an extensive review of section 3731, since amended, the court concluded:

> "An objection to the local board's classification of a registrant can be raised as a defense to a prosecution under 50 U.S.C. App. §462. . .The motion in the instant case presented questions concerning Ponto's classification, which are raised only by defense. The decision to dismiss by the district judge was based on questions presented by this defense. As such, it was a ruling on the merits of the defense. . .
>
> "Since the dismissal order was based on a determination on the merits, it was an acquittal to which jeopardy attached. . . .Thus government appeal from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited. . . .*We view this as an independent ground for holding that the government may not appeal in this case* (Emphasis mine) 454 F.2d at p. 664.

There were three dissenting judges in the *Ponto* case. They rested their opinions, however, on the fact that jeopardy had not attached since the trial had not commenced. This of course is not the situation in the present case.

In concluding on this point, counsel reiterates that the Petitioner's position that the district judge had made a purely legal ruling in dismissing the indictment and that an appeal was therefore permissible is untenable. Such a distinction is easy to articulate but not viable; the district court judge went deeply into the facts of the case and considered Ronald Jenkins' intention and knowledge of the existing law in the Second Circuit, in holding in Mr. Jenkins' favor; the district judge's dismissal was based on facts developed at trial which were not apparent on the face of the indictment and which went to the general issue of guilt or innocence and according to relevant authority such a ruling cannot be reviewed by appeal or otherwise.

THE TURE CHARACTERIZATION OF THE DISTRICT JUDGE'S RULING.

Judge Travia's conclusion after extensive discussion of Jenkins' case was:

> "The indictment in this case is dismissed and the defendant is discharged." Petitioner's App. B. p. 52A.

The characterization that the district court judge gives to his action is only the beginning and not the end of the inquiry as to what actually occurred. This is the teaching of *United States v. Sisson* 399 U.S. 267

(1970) in which the Court found that the district judge's characterization of his action as an arrest of judgement was incorrect and that what had actually occurred was that the district judge had acquitted the defendant. The court below agreed with this approach and held that the district judge had acquitted Jenkins. Apparently, the Government does not disagree with the characterization of the court of appeals, but states that whether the lower court's action is a dismissal or an acquittal is irrelevant for double jeopardy purposes. (Government's Brief, p. 13). The Petitioner analogizes the action of the district judge as being of the same character as an order arresting the judgment, a judgment ordered on special jury findings or the decision of the appellate court. (Government's Brief, p. 14). With this, the government concedes too much.

In *United States v. Sanges*, 144 U.S. 310, it was held that the Government could not appeal from a pretrial dismissal of an indictment absent an enabling statute. The Petitioner, conceding that the district judge's action was an acquittal, does not indicate under what authority the Government is able to appeal from an acquittal of the defendant. The Government cannot have its cake and eat it too. Either the district judge's decision was a dismissal of the indictment with all of the concomitant problems under *United States v. Sisson, supra*, or it was an acquittal from which no appeal is allowed since there is no statute enabling the Government to appeal from an acquittal.

In *Sisson* the Court explored whether the district court judges action was actually an arrest of judgment. The Court concluded that it was not an arrest of judgment since a judgment can only be arrested on

the basis of error appearing on the face of the record and not on the basis of proof offered at trial and that the court's adverse decision was not for insufficiency of the indictment. See Petitioner's Appendix A, p. 22a. Clearly, the same considerations apply to the instant case. According to *Sisson* and using the criteria for characterizing the judgment found in that case, the action of the district judge was not an arrest of judgment or a dismissal of the indictment but an acquittal.[4]

WHETHER A NEW TRIAL WOULD BE REQUIRED IF THE CASE WERE REVERSED.

The argument under this point is approached with the same uneasiness that one might approach the answer to the question "Are you still beating your wife?" Thus, a yes or no answer involves some admission of wrongdoing. In fact, whether a retrial would be required on reversal or not is a misleading question, since it is not relevant whether a retrial is required or not for double jeopardy purposes. As stated in *United States v. Ball, supra*, a verdict of acquittal is final and could not be reviewed on error or otherwise without putting an individual "twice in jeopardy and thereby violating the Constitution". *Ball, supra* at p. 671, *Kepner v. U.S.*, 195 U.S. 100 (1904).

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[4]It certainly must be relevant to this inquiry, although not dispositive, that at no time did counsel request the district court to dismiss the indictment but was quite consistent in requesting that the district judge acquit the defendant.

If the Court is to determine that whether a retrial is necessary or not is relevant for double jeopardy purposes the respondent brings to light the following considerations. The court below recognized that a possible defense that could be raised on retrial is that the registrant "reasonably relief in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim." App. A, p. 28a, quoting from *United States v. Mercado*, 478 F.2d 1108 at P. 1111 (2nd Cir. 1973). Respondent in no way waived this defense at the lower court level as the Petitioner seems to suggest.

In fact, at the trial the respondent called Jerome Bibuld, Mr. Jenkins' draft counselor as a witness. The Government requested an offer of proof and when counsel suggested that Mr. Bibuld would testify as to his discussion with Mr. Jenkins with regards to his conscientious objection claim, the court excluded the witness' testimony. The district court stated in support of its decision:

> "THE COURT: What do we need this testimony for? Did they have the right to close off then and not consider it? That to me is a question of law here, not further proof.
>
> MR. CARROLL: I object to that. I except to that.
>
> THE COURT: I will deny the offer of proof if that offer of proof is directed in that area of adding testimony which would have, say, built up his claim which had been by the Board denied to be reviewed.
>
> All right, that's out. Denied"
> App. p. 74.

Thus, the testimony of the draft counselor who would have testified as to Mr. Jenkins' intent on and immediately before February 24, 1971 was excluded by the district court on the grounds that the testimony would be redundant.

Prior to Mr. Bibuld's taking the stand the registrant had testified that he had spoken to Mr. Bibuld prior to February 24, 1971 but after February 4, 1971, the date that the induction order was mailed out. The registrant testified in part as follows:

"Q. Could you please tell us what transpired when you saw Mr. Bibuld?

A. Well, we did, you know, the usual questions, information that I related to the induction order and during the course of our discussion the matter of conscientious objection, you know, was brought to my attention. Prior to that time, I wasn't aware of the definition for conscientious objection nor of my rights under the Selective Service Laws." App. p. 51.

The registrant was thus testifying that his beliefs as to conscientious objection had crystallized after his induction order was received but before induction and that he was aware of his rights under the Selective Service Act with regards to claiming such exemption prior to February 24, 1971.

The questions then as to whether a retrial would be required upon reversal of this case is a non-sequitur. Even if this is relevant, however, the case would have to be remanded for retrial because the district court was not aware at the time that the registrant's intent could

be raised in defense to an indictment under 50 U.S.C. App. section 462.[5]

THE THICKET THROUGH WHICH THE COURT MUST WADE.

The Petitioner suggests that the thicket of cases through which the court must wade to find that the court of appeals had jurisdiction to hear the appeal in the instant case is not so thick after all. Respondent disagrees and contends that a fence or wall has been constructed between the petitioner and its position by the following cases: *United States v. Ball,* 163 U.S. 662 (1896).

In *United States v. Ball, supra,* two individuals by the name of Ball and one individual by the name of Boutwell were indicted for the murder of William T. Box, in an indictment charging that the defendants being white men and not Indians, on June 26, 1889 in Pickens County, in the Chickasaw Nation in the Indian Territory did unlawfully and with malice aforethought shoot the contents of a gun in Box's body and as a result Box died. The three defendants were arraigned

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[5]The issue of whether a retrial would be necessitated is further complicated by the uncertainty arising under Presidential Proclamation 4313. September 16, 1974 (Weekly Compilation of Presidential Documents, vol.10, No. 38) This Proclamation established a program for the return of Vietnam Era Draft Evaders and military deserters. It has not yet been determined what its effect will be on a defendant who has been acquitted of violation of the Selective Service Act and Regulations (Title 50 U.S.C. App. §462(a)) and whose case is on appeal by the government, as in the instant case.

however, considered that such a position would be unjust if followed in this country since it would allow the prosecutor to raise his own ineptitude in failing to properly indict the defendant on an appeal. *Ball, supra* at 668. After full consideration of the issue, the Court stated that it was unable to resist the conclusion that:

> "A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect is a bar to a second indictment for the same killing". *Ball, supra*, at p.669.

Further, the Court stated:

> "Millard F. Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgement against the other defendants upon the writ of error sued out by them only." *Ball, supra* at p.670.

Finally, in disposing of the issue and discharging Millard F. Ball, the Court concluded:

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise without putting him twice in jeopardy and thereby violating the Constitution. However, it may be in England, in this country, a verdict of acquittal although not followed by any judgement is a bar to a subsequent prosecution for the same offence. *United States v. Sanges*, 144 U.S. 310 and other cases cited herein at *Ball, supra* at p. 671.

The Government characterizes this as mere dictum in their brief. Petitioner's Brief, p. 28. However, it is clear

that the Court was dealing with the issue of reversal of Millard F. Ball's acquittal by the appeal taken by his two co-defendants. It is also clear that the Court considered extensively the existing British rule as enunciated in *Vaux's Case, supra,* which allowed such appeals and the Court rejected the British rule. Therefore, its statement that no review was allowed of a general verdict of acquittal by error or otherwise was not mere dictum but the holding of the case. To underline this point, the Court in subsequent cases treated the "dictum" of *Ball* as its holding.

KEPNER V. UNITED STATES, 195 U.S. 100 (1904)

In *Kepner v. United States, supra,* the question whether a provision against double jeopardy embodied in an Act of Congress for the government of the Philippines (32 Stat. 691 [1902]) prevented a Government appeal after an acquittal at trial was raised. Kepner was a Philippine attorney who had been acquitted of the charge of embezzlement after trial before the court. On Appeal to the Supreme Court of the Philippines Kepner's acquittal was reversed, he was found guilty and sentenced. The Court reversed the conviction and held that an acquittal in the trial court barred review on appeal by the Government and that this was true whether trial had been before the court or jury and whether Philippine custom had been otherwise or not.

The Court stated in pertinent part that:

"The Court of first instance, having jurisdiction to try the questions of guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court is to put him a second time in jeoparty [sic] for the same offense if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well settled sense as declared and settled by the decisions of this court"
Kepner, supra at p. 133.

In *Kepner,* the Court had under its consideration an Act of Congress that prohibited a defendant from being put twice in jeopardy for the same offense. Also, in contradistinction to the statute was a military order (No. 58 as amended by act of the Philippine Commission, No. 194 – See *Kepner* at p. 133) which purported to give the Government the right to appeal from acquittals. There was an extensive discussion of Philippine custom which was based on Spanish Civil Law in which jeopardy was continuous until the court of last resort had ruled. After this discussion, however, the Court concluded that it was Congress' intent to give the Philippines the protection of our Bill of Rights regardless of Philippine custom. Under our Bill of Rights, the Court stated quoting from *U.S. v. Ball, supra,* an acquittal could not be reviewed by error or otherwise, *Kepner, supra* at p. 131 quoting from *U.S. v. Ball, supra* at p. 671.

Although the Government in their brief (Pet. Brief, p. 30) stated that since *Kepner* involved the interpretation of an Act of Congress and not the Constitution its interpretation cannot be binding on this

Court's interpretation of the Fifth Amendment. This might be true under other situations, but certainly not when the *Kepner* court made it clear that it was interpreting the Fifth Amendment and not merely an Act of Congress.

> "When Congress came to pass the Act of July 1, 1902, it enacted almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the president declared to be established as rules of law for the maintenance of individual freedom at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.
>
> "How can it be successfully maintained that those expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense then that which has been placed upon them in construing the instrument from which they were taken?"

FONG FOO V. UNITED STATES, 369 U.S. 141 (1962)

In this case three government witnesses had already testified and a fourth was in the middle of his

testimony when the district judge stopped the proceedings. Thus far, the situation is similar to one in which a mistrial is declared in the middle of trial. If there is a manifest necessity for the declaration of the mistrial, it is settled that the defendant can be retried since he was never in jeopardy. *United States v. Jorn*, 400 U.S. 470 (1971); *Illinois v. Sommerville*, 410 U.S. 458 (1973). In *Fong Foo*, however, the district court judge did something unusual. Instead of declaring a mistrial, he stopped the trial and directed the jury to come in with a verdict of acquittal. A formal judgment of acquittal was subsequently entered. The record reveals that the judge directed acquittal on two grounds: 1) the lack of credibility of government witnesses; 2) the misconduct of the prosecutor.

The Government filed a petition for writ of mandamus to the Court of Appeals for the First Circuit, praying that the judgment of acquittal be vacated and the case reassigned for trial. The Court of Appeals granted the petition upon the ground that under the circumstances the court was without power to take the action that it did.

This Court rejected the reasoning of the Court of Appeals since the decisions that the court of appeals relied upon (*Ex Parte United States*, 242 U.S. 27 and *Ex Parte United States*, 287 U.S. 241) did not involve the double jeopardy clause. The decision is short and the respondent quotes it in large part:

> "Neither of those decisions involved the guaranty of the Fifth Amendment that no person shall be subject for the same offense to be twice put in jeopardy of life or limb'. That constitutional

provision is at the very root of the present case and we cannot but conclude that the guaranty was violated when the Court of Appeals set aside the judgement of acquittal and directed that the petitioners be tried again for the same offense.

"The petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and the subject matter . . . The Court of Appeals thought, not without reason, that the acquittal was based upon an agregiously erroneous foundation. Nevertheless, the verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy and thereby violating the Constitution.' ".

Fong Foo at p. 631 citing *U.S. v. Ball, supra.*

The Government distinguishes *Fong Foo* on the grounds that it is not our case, if only because there "a new trial must have followed a successful appeal." Petitioner's Brief, p. 33. Respondent does not maintain that *Fong Foo* is the same case as *Jenkins.* In fact if anything, *Jenkins* is much stronger than *Fong Foo* as far as the Fifth Amendment guarantee is concerned. This is true because Jenkins waived trial by jury, proceeded to trial before the court which made findings of fact and conclusions of law and entered final judgment in favor of the defendant. *Fong Foo,* to the contrary, was very close to a mistrial situation distinguished by the fact that the judge terminated the trial in a very unique manner and made a special finding as to the credibility and demeanor of the Government's witnesses.

Fong Foo also reveals the weakness of the Government's position with regards to the necessity or lack of necessity for a retrial. The Government makes

much of the fact that the *Fong Foo* court stated that the Fifth Amendment guarantee was violated when the court of appeals set aside the judgment of acquittal *and* directed that the petitioners be tried again. However, if the court of appeals had held in favor of the defendants originally, this court would have never had the occasion to discuss whether a retrial would have been required or not. The decision as to jurisdiction and the decision as to the necessity or lack of necessity for a retrial are two separate and distinct inquiries. The first is an inquiry as to the power of the court to review the matter at hand in the first place. The second decision as to the necessity for a retrial is intrinsically linked with a finding that jurisdiction exists and that the lower court was in error. However, the second issue cannot be reached without a determination on the first issue. However, in determining the first issue, jurisdiction clear and simple, it is not necessary to inquire into the second. Since the two considerations are divorced from one another, it unnecessarily confuses the issue to ask this court to determine *before* reaching the issue of jurisdiction whether the decision on the merits was correct or not.

UNITED STATES V. SISSON, 399 U.S. 267 (1970)

Sisson was indicted in the District of Massachusetts for wilfully failing to report for induction as ordered by the local board. He moved to dismiss the indictment prior to trial on several grounds all of which were denied by the district court and the case proceeded to trial before a judge and jury. The judge's instructions to

the jury advised the jurors that the crux of the case was whether the defendant's refusal to submit to induction was 'unlawful, knowingly and wilfully' done. The jury found the registrant guilty. Thereafter, a motion to arrest and judgment on the ground that the district court lacked jurisdiction was made. The Court granted the motion on several grounds one of which was that the Free Exercise and Due Process clauses prohibited application of the Military Selective Service Act to Sisson because as a "sincerely conscientious man" his interest in not killing in Vietnam outweighed "the country's present need for him to be so employed". Sisson had satisfied the judge during the course of his trial that he had genuine objections to fighting in Vietnam founded on moral values derived from religious writings and philosophical beliefs and the court's decision was therefore a decision as to the wilfullness of Sisson in refusing induction; and that Section 6i of the Selective Service Act violated the Constitution.

The Government appealed to this Court under former section 3731 (See *supra*) and the Court dismissed the Government's appeal for lack of jurisdiction. Despite the language of the district court, this Court held that the district court's order was not one arresting the judgment but an acquittal on the merits. The Court reached this conclusion because the decision was not based on the insufficiency of the indictment nor on the basis of error appealing on the face of the record. *Sisson* at p. 281 and 287-288.

As stated at page 288 of 399 U.S. at the commencement of Part IIC of the opinion which had a majority of the court:

"The same reason underlying our conclusion that this was not a decision arresting judgement – i.e. that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial – convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty".

Whether the judge's constitutional theory was erroneous or not was irrelevant according to the Court. If a judge had given erroneous instructions to a jury similar to the district court's decision to "arrest the judgment, the jury's verdict on such instructions could not be disturbed. As such, the judge's decision could not be disturbed in this case without violating the double jeopardy clause.

"Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise without putting [the defendant] twice in jeopardy and thereby violating the Constitution.... In this country a verdict of acquittal, although not followed by any judgement, is a bar to a subsequent prosecution for the same offence.
United States v. Ball, 163 U.S. 662 (1896)" *Sisson* at pp. 290-291.

The Court's decision in *Sisson* did not rest on the fact that the judge *could* have sent the case to the jury (as per the hypothetical situation) but rather on what the district court did – "i.e. render a legal determination on the basis of facts adduced at trial relating to the general issue of the case". *Sisson, supra* at p. 301. (In Green the Court was referring to *Trono v. United States*, 199 U.S. 521, a case decided a year after

Kepner, which also involved an interpretation of the statutory double jeopardy provision applicable in the Philippines.)

Whether a new trial was requested or not in *Sisson* as in the other cases discussed is completely irrelevant. Since, however, the Government has made this an issue, it can be stated that the Court had stated that *Sisson* could not be retried after the dismissal for lack of jurisdiction. *Sisson, supra*, at p. 290, footnote 18). The Government in its Brief, indicated that a retrial was not sought in *Sisson* by the Government. Yet, that is exactly the situation in the instant case, but *Sisson* held that there was no jurisdiction for the appeal in an analogous situation where no new trial was sought. If the fact that the Government was or was not seeking a new trial was not considered relevant in *Sisson*, there is no reason why it should be relevant consideration in Jenkins.

In fact, *Sisson* is dispositive of the issue. The judge made a legal determination on facts adduced at trial going to the general issue of the case and no new trial was requested by the Government. This is *Jenkins'* case (although arguably if there is a decision on the merits and it is unfavorable, a new trial *would* be necessary).

As much as the petitioner may try, *Sisson, Fong Foo, Kepner, Ball* and their progeny bar the appeal in the instant case. The only other issue that need be discussed is whether analogous situations point to the conclusion that the Court of Appeals had jurisdiction in this case. Many things may be said about analogies to a particular situation, but one thing is certain. Some may be strong and others weak but they are all analogous and by definition not directly on point.

court rendered a final determination in his favor after trial. To this date, Ronald Jenkins is not a completely free man while his case is still pending. This two year delay scarcely conforms with the notion of diligent prosecution under section 3731 of Title 18 United States Code. Such a delay only adds to the harassment and turmoil that the double jeopardy clause was bound to prevent and your respondent urges this as an independent ground for this Court's affirming the Court of Appeals finding of lack of jurisdiction, App. A. p. 3a.

CONCLUSION

The judgment of the Court of Appeals should be affirmed on the ground that section 3731 of Title 18, U.S.C. and the Fifth Amendment Double Jeopardy Clause prohibit an appeal from the judgment of the District Court.

And further the judgment of the Court of Appeals should be affirmed on the ground that the appeal in the within matter has been unjustifiably delayed in violation of the express provisions of Title 18 U.S.C., Section 3731.

Respectfully submitted,

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ANALOGOUS AREAS SEEMINGLY IMPLICATING THE DOUBLE JEOPARDY CLAUSE.

No double jeopardy claim is advanced when a court of appeals reverses a judgment of conviction of a district court. Jeopardy does not attach for double jeopardy purposes once an individual has, in a manner of speaking, run the gauntlet and lost. Any subsequent proceedings in such a case are simply that – subsequent proceedings. Therefore, rulings in such cases do not truly involve the double jeopardy clause and are not directly on point. *United States v. Russell,* 411 U.S. 423, is not directly in point for that reason although it might be interesting to examine such cases as an exercise in the logical operation of deduction without one of the premises.

The same rationale, your respondent is certain, applies to district court orders in arrest of judgment. Such orders are often appealable, but if the court made a legal determination based on facts adduced at trial going to the general issue of the case the order would not be appealable. *United States v. Sisson, supra.*

LOOKING AT THE ISSUE FROM THE POINT OF VIEW OF THE FISH.

It has been related that a great American humorist was once asked on a final examination paper to discuss a fishing treaty between the United States and Canada first from the point of the United States and then from the point of view of Canada. He declined to discuss it from either point of view, deciding that it might be

more politic to discuss it from the point of view of the fish. Certainly it seems absurd to discuss the issue of fishing treaties from the fish's point of view but to discuss the double jeopardy clause from the point of view of those accused of crime who have won at trial is not absurd at all.

Ronald Jenkins is not the United States of America, after all. Although our Government in seeking justice for all can pursue a citizen from the district court up to the Supreme Court with no noticeable attrition, it cannot be said that the individual can withstand such an onslaught as readily as a government. If it is true as the Court of Appeals in the instant case reports (App. A.p.7a) that in the thirteenth century the bar against multiple prosecutions assumed a rather grim urgency, since after many trials by battle only the hardiest combatants would survive, this is equally true today. The individual citizen is bound to come away from any battle with the resources of his Government with life long scars. If he is guilty of the offense, such scars are not too much for him to bear for going afoul of his fellow citizens. When, however, he is able to prove his innocence before a judge or jury, there should come a time when he ceases being an accused person and becomes again an ordinary citizen. This time should be after a final determination on the merits of the case after trial in which both sides have the opportunity to produce evidence in their behalf. This is all that the respondent has been requesting.

On February 24, 1971, Ronald Jenkins was not inducted into the armed forces of the United States. It is now the latter part of 1974, three and one half years after his induction date and two years after the district